Supreme Court, U.S.
FILED

03-1248 MAR 4 - 2004

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No. 04-

In The

Supreme Court of the United States

WILMA HEFFELBOWER and C. DAVID HEFFELBOWER,

Petitioners,

v.

THE CITY OF LINCOLN, NEBRASKA

Respondent.

Oo Petition For Writ Of Certiorari To The Nebraska Supreme Court

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PETITION FOR WRIT OF CERTIORARI

RICHARD DOUGLAS McCLAIN
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Counsel for Petitioners

QUESTION PRESENTED

Does "due process" under the 14th Amendment to the United States Constitution require that there be "public necessity" for the exercise of the police power of the Respondent CITY OF LINCOLN, NEBRASKA to destroy Petitioners' home?

PARTIES

The parties to this proceeding are set forth in the caption.

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Appendix A: Order of the Nebraska Supreme Court (December 10, 2003) denying Petitioners' PETITION FOR FURTHER REVIEW of the decision of the Nebraska Court of Appeals (October 21, 2003) 1a

Appendix B: Decision of the Nebraska Court of Appeals (October 21, 2003). 2a

Appendix C: Order of the District Court of Lancaster County, Nebraska (February 7, 2002). 17a

CASES:

***Blanchard v. City of Ralston*, 4 Neb. App. 692 (May 28, 1996), 549 N.W.2d 652:. 6, 7**

***Meyer v. Nebraska*, 262 U.S. 390 (1923). 8, 9**

***Lawton v. Steele*, 152 U.S. 133, 137. . . . . 9**

***Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924). 9**

***Chicago, etc. Ry. Co. v. Drainage Commissioners*, 200 U.S. 5619**

***Erickson v. Nine Mile Irrig. Dist.*, 192 N.W. 694. . . . . 9**

OTHER AUTHORITIES:

14th Amendment, United States Constitution. 6, 8

28 U.S.C. Section 1257. 6

Petitioners, WILMA HEFFELBOWER and C. DAVID HEFFELBOWER, respectfully pray that a writ of certiorari issue to review the ORDER OF THE NEBRASKA SUPREME COURT, entered on December 10, 2003, denying Petitioners' PETITION FOR FURTHER REVIEW of the October 21, 2003 decision of the NEBRASKA COURT OF APPEALS affirming the Order dated February 7, 2002 of the DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA.

OPINIONS BELOW

The ORDER OF THE NEBRASKA SUPREME COURT, entered on December 10, 2003, denying Petitioners' PETITION FOR FURTHER REVIEW of the October 21, 2003 decision of the NEBRASKA COURT OF APPEALS affirming the Order dated February 7, 2002 of the DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA, are all not reported, but are set forth in APPENDIX A, APPENDIX B and APPENDIX C, respectively.

JURISDICTION

The ORDER OF THE NEBRASKA SUPREME COURT, was entered on December 10, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution, providing:

> **"No State shall deprive any person of life, liberty or property without due process of law."**

STATEMENT OF THE CASE

Petitioners' house was damaged by fire on March 30, 1999 and the Defendant City of Lincoln on the same date declared it a dangerous building and imposed a time limit to abate dangerous conditions. Petitioners appealed through the City of Lincoln Dangerous Buildings Appeals Board, and then to the District Court, which affirmed the Board's decision. Petitioners appealed to the Court of Appeals, which affirmed the District Court on October 21, 2003.

The District Court (T140-149) affirmed the decision of Dangerous Building Code Board of Appeals. The Court of Appeals affirmed the District Court's order by its decision filed October 21, 2003. No. A-02-287. The Court of Appeals ruled that [Court of Appeals No. A-02-287 Advance Sheet at page 6]:

> **"In addition, in Blanchard II, the Nebraska Supreme Court affirmed the Court of Appeals' decision that the appellant had been denied due process without discussing "public necessity," which fact further demonstrates that public necessity is not a separate requirement from due process. We conclude that it was not necessary for the trial court in the present case to specifically consider the public necessity language in**

Blanchard I. The Heffelbowers' first assignment of error is without merit."

"PUBLIC NECESSITY IS THE LIMIT OF THE RIGHT AND THE PROPERTY CANNOT BE DESTROYED IF THE CONDITIONS WHICH MAKE IT A MENACE CAN BE ABATED IN ANY OTHER RECOGNIZED WAY. DESTRUCTION OF PROPERTY IS A DRASTIC REMEDY, AND IT MUST NECESSARILY BE A REMEDY OF LAST RESORT."

The Court of Appeals ignored the foregoing principle as demonstrated by its statement:

> **"Appellants seem to argue, especially in Assigned Error 1, that the District Court erred in their application of Blanchard by not considering Blanchard's language in head note 11 of the Court of Appeals case, 549 N.W.2d 652, 4 Neb.App. 692 (1996), commenting that "while the right exists in the exercise of the police power to destroy property which is a menace to public health or safety, public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Destruction of property is a drastic remedy, and it must necessarily be a remedy of last resort". Thus, Appellants seem to see Blanchard for the principle that "public necessity is required before a municipality can remove a dangerous building."**

The foregoing is exactly Petitioners' position that "public necessity" is the basic underpinning of the City's police power.

The Court of Appeals erroneously ruled (Page 6, Advance Report Court of Appeals No. A-02-287): "We conclude that it was not necessary for the trial court in the present case to specifically consider the public necessity language in Blanchard 1.", which is plain error.

It is submitted by Petitioners that by merely satisfying "due process" (by a time line definition only) the Appellee THE CITY OF LINCOLN is still not empowered to reach beyond "public necessity" and thereby go beyond the police power.

At all times herein there existed another "recognized way to abate the menace", i.e., that so long as the owner is diligently working "public necessity" for destruction has not yet been met, especially because the Heffelbowers' property never was a menace to the public outside the premises, and because it was put in a condition by bracing and other work so that it became no more dangerous than any other construction site, as to which there is no time limit on the building permit so long as an owner does not stop working on the construction permit for 6 months, which is a "recognized way" in every building permit issued by Appellee THE CITY OF LINCOLN. The Court of Appeals (Page 5 of Advance Sheet No. A-02-287) acknowledged the following testimony of Leroy William Hoffman, a Licensed Structural Engineer, President of Aitken, Hazen, Hoffman and Miller, Architects and Engineers, former Lincoln City Councilman, and one of 12 on a committee for the adoption of the Uniform Building Code and the

Dangerous Building Code, testified for the Appellants, (9:14 et seq.) as follows:

> **"Hoffman, the licensed structural engineer who helped David prepare the specifications for the removal of the dangerous conditions, testified that after the building was secured against entry by the public and the temporary bracing was in place, the building was no longer dangerous to the public or to anyone working in the building."**

There was constitutional error in violating the 14th Amendment to the United States Constitution, which provides:

> **"No State shall deprive any person of life, liberty or property without due process of law."**

in not considering in the District Court, the Court of Appeals and the Supreme Court herein the issue of "public necessity" as the extent of the "police power", all as further set forth in Appellant's PETITION FOR FURTHER REVIEW, and under the following decisions of the Supreme Court of the United States:

***Meyer v. Nebraska*, 262 U.S. 390 (1923), stating at Page 392:**

> **"The statute in question is not a legitimate exercise of the police power."**

at Page 399 as to the 14th Amendment:

> **"No State shall deprive any person of life, liberty or property without due process of law." and at 262 U.S. 390,**

and at Page 400:

> **"Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton v. Steele*, 152 U.S. 133, 137."**

***Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (in error to the Supreme Court of the State of Nebraska), states at Page 507:**

> **"Only public necessity can justify the exercise of the police power by a State. *Chicago, etc. Ry. Co. v. Drainage Commissioners*, 200 U.S. 561; *State v. Edgecomb*, *supra*; *People v. Klinck*, 214 N.Y. 121."**
>
> * * *
>
> **"The constitutionality of a law may depend upon the result of its practical operation. *Erickson v. Nine Mile Irrig. Dist.*, 192 N.W. 694."**
>
> * * *
>
> **"Determination by the legislature of what constitutes proper exercise of police power is subject to supervision by the courts. *Meyer v. Nebraska*, *supra*; *Mugler v. Kansas*, *supra*."**

REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court refused to overrule the Nebraska Court of Appeals and require that "public necessity" must exist as a requirement of "due process" before the destruction of Petitioners' home.

The Nebraska Supreme Court, the Nebraska Court of Appeals and the District Court of Lancaster County, Nebraska, all refused even to consider whether "public necessity" is the limit of the police power and that if the government goes beyond "public necessity" there is no due process. The case should be remanded to require the issue of "public necessity" be at least considered by the Nebraska courts before the Petitioners' house is destroyed.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Nebraska Supreme Court and the Nebraska Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
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December 10, 2003

Richard Douglas McClain
Plaza Mall South, Suite 111
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Lincoln, NE 68508

IN CASE OF: A-02-000287, Heffelbower v. The City of Lincoln

Pet. of Applt. for Further Review & Brf. filed 11/19/03

has been reviewed by the court and the following order entered:

Petition for further review overruled.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

APPENDIX B

OPINION OF THE NEBRASKA COURT OF APPEALS
(Not Designated for Permanent Publication)
Case Title

C. DAVID HEFFELBOWER AND WILMA HEFFELBOWER, APPELLANTS, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE.

Case Caption
HEFFELBOWER V. CITY OF LINCOLN
Filed October 21, 2003. No. A-02-287.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Richard Douglas McClain for appellants.

Dana W. Roper, Lincoln City Attorney, and Margaret M. Blatchford for appellee.

HEFFELBOWER V. CITY OF LINCOLN

Filed October 21, 2003. No. A-02-287.

HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired. BUCKLEY, District Judge, Retired.

INTRODUCTION

C. David Heffelbower (David) and Wilma Heffelbower appeal from an order of the district court for Lancaster

County in which order the trial court affirmed the order of the dangerous buildings code board of appeals (the Board) of the City of Lincoln (the City), finding that the Heffelbowers' residence remained a dangerous building in need of repair or demolition and requiring the Lincoln Building and Safety Department (the Department) to repair or demolish the building. For the reasons that follow, we affirm.

BACKGROUND

The following facts were stipulated to by the parties before the trial court:

On March 30, 1999, a fire occurred at a residence in Lincoln, Nebraska, occupied by the Heffelbowers, who are husband and wife.

On March 30, 1999, an abatement notice was sent by the City to Wilma advising her that a city building official had declared that dangerous conditions existed at the residence and ordering her to demolish or repair the building by May 30.

On October 13, 1999, an appeal of the March 30 abatement notice was filed by the Heffelbowers with the Board. The appeal was filed after the 30-day deadline of April 30. However, the City elected to send a second abatement notice because David was not named on the March 30 abatement notice and it was necessary to ensure that both parties who had an ownership interest in the residence had proper notice.

On November 17, 1999, a second abatement notice was sent by the City to the Heffelbowers advising both of them that

a city building official had declared that dangerous conditions existed at the residence and ordering them to demolish or repair the building by January 17, 2000.

On November 24, 1999, the Heffelbowers appealed the second abatement notice to the Board, contesting the time given for the completion of all the repair work at the residence and asking for 120 days, or a delay until April 14, 2000, to complete the repair work.

On December 9, 1999, a hearing notice was sent by John Boies, chief housing inspector for the City, to the Heffelbowers advising them that their appeal from the second abatement notice would be heard before the Board on December 29.

On December 29, 1999, the Heffelbowers' appeal was heard. On January 11, 2000, the Board issued an order, finding that the Heffelbowers should be given additional time to complete the repairs necessary to abate the dangerous conditions at their residence. The January 11 order stayed and suspended the November 17, 1999, abatement notice, subject to certain conditions.

The first condition required the Heffelbowers to submit to the Department, within 15 days from the date of the order, detailed plans for temporary bracing of the building to prevent its collapse. The temporary bracing plans had to bear the signature and the seal of a licensed structural engineer. The 15-day deadline from the date of the order was January 26, 2000. Temporary bracing plans for the building were filed by Leroy Hoffman, a licensed structural engineer, on January 26.

The second condition of the January 11, 2000, order required the Heffelbowers to submit an application to the Department for a building permit to abate the dangerous conditions of the building and have the temporary bracing

in place within 30 days from the date of the order. The application for the building permit had to include plans that complied with city codes and had to bear the signature and seal of a licensed structural engineer. Also within 30 days from the date of the order, the Heffelbowers had to have all extraneous items within the building removed so as not to impede or interfere with the required repairs. The 30-day deadline from the date of the order was February 10.

The Department recorded David's application for a building permit on February 9, 2000. The application did not include plans submitted with an engineer's stamp. David sent plans dated March 19, 2000, with a structural engineer's stamp that were received by the City on March 21.

The third condition of the January 11, 2000, order required that within 120 days after the Heffelbowers obtained a building permit, the dangerous conditions of the building be fully abated, and that thereafter, the repairs and rehabilitation of the building proceed steadily until the building met city codes and was ready to be occupied. The building permit was applied for on February 9 and was approved on March 31. The 120-day deadline from the date after approval of the building permit was July 29.
The January 11, 2000, order stated that if within 30 days from the date of the order, the first and second conditions had not been met, then the City could proceed in its demolition of the building without further order of the Board, in accordance with § 701 of the 1994 edition of the Uniform Code for the Abatement of Dangerous Buildings.

The January 11, 2000, order further stated that if the first and second conditions have been met, but within 120 days from the date of the issuance of a building permit the third condition has not been met, a building official shall reschedule the matter upon 10 days' written notice to the Heffelbowers for further hearing as to whether they should be given additional time to complete the third condition or whether the City may proceed in its demolition of the

building.

On June 22, 2000, the Heffelbowers applied to the Department for a mechanical or gas piping permit for the residence. Said permit was issued on June 22.

Also on June 22, 2000, the Heffelbowers applied to the Department for a plumbing or gas piping or excavation permit for the residence. Said permit was likewise issued on June 22.

The Department recorded the Heffelbowers' successful application for an electrical permit for the residence on June 22, 2000, and said permit was issued on the same day. On
July 28, the Department approved an electrical installment and submitted a daily order sheet to Lincoln Electric System (LES) to energize the installment.

On August 10, 2000, LES completed a service work ticket for the Heffelbowers at their residence indicating that electrical service began on that property on August 10; thus, it took LES 8 working days from July 28 to install electrical service at the residence.

On August 16, 2000, Boies, the chief housing inspector for the City, sent a "Notice" to the Heffelbowers advising them that a hearing would be held on September 14 before the Board regarding the November 17, 1999, abatement notice.

On September 26, 2000, the Board issued an order pursuant to the hearing held on September 14, finding that the Heffelbowers failed to comply with the Board's order of January 11, that additional time had already been allowed to stabilize the building, that the building nevertheless remained a dangerous one in need of repair or demolition, and that additional time to abate or repair the building was not warranted under the circumstances. The Board sustained the Heffelbowers' initial appeal of the time given in the November 17, 1999, abatement notice, "but only to the extent of the time previously allowed and the additional

time is hereby allowed through September 14, 2000." The Board affirmed the November 17, 1999, abatement notice in all other respects. The Board found that the building at the Heffelbowers' residence was and remained a dangerous building and that the director of building and safety should proceed to repair the building or demolish it. The amount of time given by the Board's order to abate the dangerous conditions was from March 31, 2000, the approval date of the building permit, through that September 14, which is equivalent to 167 days.

This ends the parties' stipulated facts. Additional evidence and testimony were presented to the trial court and will be discussed as needed in the analysis section of this opinion. Following trial, the trial court affirmed the September 26, 2000, order of the Board. The trial court found that the Heffelbowers had failed to abate the dangerous conditions of the building and that the building remained dangerous under the City's Dangerous Building Code. The court further found that the Heffelbowers had had more than a reasonable amount of time to repair the dangerous conditions and that the evidence did not support the Heffelbowers' argument that the City or LES had somehow acted to impede the Heffelbowers' ability to abate the dangerous conditions. Further, the trial court found that Blanchard v. City of Ralston, 251 Neb. 706, 559 N.W.2d 735 (1997) (Blanchard II), was inapplicable to the facts and circumstances of the present case because the City had provided the Heffelbowers with ample due process.

ASSIGNMENTS OF ERROR

The Heffelbowers assign, restated, that the trial court erred in (1) failing to consider or apply certain language found in Blanchard v. City of Ralston, 4 Neb. App. 692, 549 N.W.2d 652 (1996) (Blanchard I), aff'd 251 Neb. 706, 559 N.W.2d 735 (1997); (2) failing to find that once they secured the building against entry by the public and put the temporary bracing in place, the time limits for a typical construction site should have applied; (3) failing to adjust for the fact that they were working on the repairs themselves; (4)

failing to recognize that city ordinances can run afoul constitutionally by going beyond public necessity and can be declared unconstitutional; (5) failing to find that the period between August 10, 2000, the date electrical power was obtained, and September 14, 2000, the date the Board reconvened, was insufficient time in which to abate the dangerous conditions; (6) failing to find that the City or LES impeded their ability to abate the dangerous conditions by "losing" electrical permit applications; and (7) failing to find that the dangerous conditions as listed in the first and second abatement notices were "ambiguous, amorphous, vague generalities."

STANDARD OF REVIEW

In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court; however, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. Preister v. Madison County, 258 Neb. 775, 606 N.W.2d 756 (2000); Whitehead Oil Co. v. City of Lincoln, 245 Neb. 660, 515 N.W.2d 390 (1994).

ANALYSIS

The Heffelbowers first assign that the trial court erred in failing to consider or apply certain language found in Blanchard l. In Blanchard 1, the city of Ralston determined by investigation that a house owned by the appellant constituted a public health hazard and was an unsafe building. Pursuant to the Ralston Municipal Code, the mayor determined that the health hazard constituted an emergency situation and that the house should be demolished. The Ralston City Council held a meeting to discuss the procedure. The procedure consisted of posting a notice on the house, waiting 3 days, and then demolishing the house. The posting indicated that the house had been

determined to be unsafe and a nuisance and that the appellant had 3 days from the date of the posting to remedy the condition or demolish the house. The appellant was never personally served with the notice. She filed an appeal, and a hearing was held before the city council. The council denied her appeal and her request for a 2-week delay to clean the house and voted to declare an emergency situation. The house was demolished the same day. Subsequently to the demolition, the appellant filed a petition in district court for inverse condemnation, alleging a violation of the Ralston Municipal Code in that she had not been given proper notice or a reasonable time in which to repair the house. The district court dismissed her petition.

On appeal, the Nebraska Court of Appeals held that while the city of Ralston had the power to demolish the house, it had not provided the appellant with proper notice prior to doing so. Thus, the court concluded that the demolition of the house without proper notice had violated the appellant's right to procedural due process and that as a result, for the purpose of an inverse condemnation action, a taking had occurred. The Court of Appeals reversed the district court's judgment and remanded the cause for trial on damages. On petition for further review, the Nebraska Supreme Court affirmed the judgment of the Court of Appeals.

The Heffelbowers argue that although the trial court herein considered Blanchard I in its order and found it inapplicable to the facts and circumstances of this case, the trial court erred in its application of Blanchard I by failing to consider or apply the following language found in the Court of Appeals' opinion:

> **As one commentator noted: "While the right exists in the exercise of the police power to destroy property which is a menace to public health or safety, public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other**

> **recognized way. Destruction of property is a drastic remedy, and it must necessarily be a remedy of last resort." 7A [Eugene] McQuillan,**
>
> **[The Law of Municipal Corporations] § 24.561 at 183 [(3d rev. ed. 1989)].**

Blanchard 1, 4 Neb. App. at 708, 549 N.W.2d at 662. The Heffelbowers seem to argue that by quoting this section in its analysis, the Court of Appeals created a separate public necessity requirement that must be met before property is destroyed. The Heffelbowers contend that it is this requirement that is applicable in the present case, rather than the due process requirement which must be met before a municipality can demolish a dangerous building. The Heffelbowers argue that it is not a matter of public necessity that their house be destroyed.

The sole issue in Blanchard I was whether the appellant was afforded due process before the house was demolished. In Blanchard l, the above-quoted section which included the public necessity language was not a separate holding in the case. Rather, the quoted section was included as part of the due process analysis in which the Court of Appeals determined that the appellant's right to procedural due process had been violated. The quoted section simply demonstrated that public necessity is the limit of the right to destroy property and that a property owner must be given an opportunity to abate the dangerous conditions before the property can be destroyed. In the present case, the Heffelbowers' house was determined to be a dangerous building by the City, meaning that it was a menace to public health and safety. The Heffelbowers were given an opportunity to abate the dangerous conditions and failed, so it became a matter of public necessity that the house be destroyed. In addition, in Blanchard II, the Nebraska Supreme Court affirmed the Court of Appeals' decision that the appellant had been denied due process without discussing "public necessity," which fact further demonstrates that public necessity is not a separate requirement from due process. We conclude that it was not

necessary for the trial court in the present case to specifically consider the public necessity language in Blanchard 1. The Heffelbowers' first assignment of error is without merit.

The Heffelbowers next assign that the trial court erred in failing to find that once they secured the building against entry by the public and put the temporary bracing in place, the time limits for a typical construction site should have applied, rather than the time limits applicable to dangerous buildings. Under the City's Dangerous Building Code, which has adopted the Uniform Code for the Abatement of Dangerous Buildings, a dangerous building that is to be repaired must be repaired within such time as a building official shall determine is reasonable under the circumstances. See Uniform Code for the Abatement of Dangerous Buildings § 401.2(3)(3.1) (1994). The building official may grant an extension of time, not to exceed an additional 120 days, within which to complete the repairs. See Uniform Code for the Abatement of Dangerous Buildings § 702 (1994). However, for general or typical construction governed by the Lincoln Building Code, which has adopted the 1997 edition of the Uniform Building Code, a building permit issued by a building official expires if the work authorized is not commenced within 180 days from the date of the permit or is suspended or abandoned any time after the work is commenced for a period of 180 days. See Uniform Building Code § 106.4.4 (1997).

David testified that the first work he did on the building included securing it against entry by the public and putting up the required temporary bracing to prevent collapse. Hoffman, the licensed structural engineer who helped David prepare the specifications for the removal of the dangerous conditions, testified that after the building was secured against entry by the public and the temporary bracing was in place, the building was no longer dangerous to the public or to anyone working in the building. He further testified that at that point, the building was no more dangerous than a regular construction site and should have been treated as such. Based on Hoffman's testimony, the

Heffelbowers argue that the building should be treated as a typical construction site under the Lincoln Building Code and that there should not be a time limit on completing the repairs as long as they continue to work on the building.

However, the issue is not whether the building is more dangerous than a typical construction site. If the building continues to have dangerous conditions, it is subject to the City's Dangerous Building Code and is not treated like a typical construction site. The evidence shows that simply preventing access by the public and putting up temporary bracing does not abate the dangerous conditions. The City's Dangerous Building Code § 20.04.025 specifically states that when a building is determined to be dangerous, it is not a defense that the building "is boarded up or otherwise enclosed so as to prevent access to the building." Boies, the chief housing inspector for the City, testified that the purpose of the temporary bracing was not to eliminate any of the dangerous conditions. Boies testified that the temporary bracing does not abate the dangerous conditions, but, rather, creates an atmosphere wherein one can start making the repairs. He further testified that making the building safe to work in does not abate the dangerous conditions.

The chief building inspector for the Department also testified that the temporary bracing did not eliminate the dangerous conditions. He testified that under a building permit for typical construction, there is no time limit on the construction as long as the work is not discontinued or abandoned. However, he further testified that in the case of a dangerous building, only after the dangerous conditions are abated does the building permit time limit for typical construction supplant that for dangerous buildings. Thus, the evidence showed that the dangerous conditions still existed after the building was secured against entry by the public and the temporary bracing was put in place.

Therefore, the Dangerous Building Code was still applicable and the trial court did not err in failing to find that the time limits for a typical construction site under the

Lincoln Building Code should have applied.

The Heffelbowers next assign that the trial court erred in failing to adjust for the fact that they were working on the repairs to the building themselves. The Heffelbowers argue that because they were doing the repair work, rather than hiring someone to do it, they should have been allowed more time than that allowed under the City's Dangerous Building Code to abate the dangerous conditions or their situation should have been treated in the same manner as typical construction under the Lincoln Building Code. The Heffelbowers did not present any evidence to show that they have not been able to abate the dangerous conditions in the time allowed because they were doing the work themselves. In addition, there is no authority to support the Heffelbowers' contention that they should be allowed additional time simply because they are doing the repair work themselves. This assignment is without merit.

The Heffelbowers assign that the trial court erred in failing to recognize that city ordinances can run afoul constitutionally by going beyond public necessity and can be declared unconstitutional. The Heffelbowers do not cite a specific ordinance that they claim is unconstitutional. Rather, they make only a general allegation that city ordinances can be unconstitutional. The issue of an unconstitutional ordinance was not brought before the trial court in any manner, so the Heffelbowers are precluded from raising the issue at this time. An appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court. Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003); Maxwell V. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001).

The Heffelbowers next assign that the trial court erred in failing to find that the period between August 10, 2000, the date electrical power was obtained, and September 14, 2000, the date the Board reconvened, was an insufficient amount of time in which to abate the dangerous conditions. The Heffelbowers also assign that the trial court erred in failing to find that the City or LES impeded their ability to

abate the dangerous conditions by "losing" electrical permit applications. In these two assignments of error, the Heffelbowers argue that electrical power was necessary to do the repair work and abate the dangerous conditions and that their inability to obtain electrical power before August 10 delayed their progress. Thus, they argue that the period between August 10 and September 14 was not a reasonable amount of time in which to abate the dangerous conditions. The two assignments will be discussed together.

The Heffelbowers applied for and were issued an electrical permit on June 22, 2000. David testified that he applied for an electrical permit with the Department in September and December 1999 and in February 2000. However, his testimony also reflects that when he applied for the electrical permit on the occasions prior to June 22, 2000, he did not have a building permit to submit with the electrical permit application. The plans examiner for the Department testified that a building permit must be issued before an electrical permit can be issued. He testified that if the Heffelbowers applied for an electrical permit before the building permit was issued on March 31, 2000, the electrical permit application should have been denied.

After the Heffelbowers were issued an electrical permit on June 22, 2000, Darrell Bilka, an electrical inspector for the City, inspected David's electrical wiring for proper installation on July 14. During Bilka's inspection, he found faulty wiring work, and he instructed David that it must be corrected before the City would approve electrical service. Bilka performed a second inspection on July 19. At this inspection, Bilka discovered faulty grounding of an electrical conductor, and he required it to be corrected. Bilka performed a third inspection on July 28, upon which he approved the electrical installment and turned the approval over to LES to energize the installment, which it did on August 10.

The evidence shows that the delay in obtaining electrical service was a result of the Heffelbowers' actions and was

not caused by the City. The Heffelbowers applied for an electrical permit on several occasions before their building permit was approved, and after the building permit was approved on March 31, 2000, they waited until June 22 to apply for the electrical permit. There is no evidence that the City "lost" the Heffelbowers' electrical permit applications, as the Heffelbowers suggest, or acted in any way that prevented the Heffelbowers from obtaining an electrical permit at an earlier date. The Heffelbowers knew that they had 120 days after obtaining a building permit to abate the dangerous conditions. David testified that electrical power was necessary to abate the dangerous conditions, yet the Heffelbowers did not apply for an electrical permit for more than 80 days after obtaining the building permit. The Heffelbowers presented no evidence that they applied for an electrical permit on any other date besides June 22 after obtaining the building permit in March. After the electrical permit was received, electrical service was delayed due to David's electrical wiring work that had to be corrected before the City would approve electrical service. We conclude that there is no merit to the Heffelbowers' assignments that they had an insufficient amount of time to abate the dangerous conditions after they obtained electrical power and that the City or LES impeded their ability to abate the dangerous conditions.

Finally, the Heffelbowers assign that the trial court erred in failing to find that the dangerous conditions as listed in the first and second abatement notices sent to them were "ambiguous, amorphous, vague generalities." The Heffelbowers argue that the notices provided insufficient guidance to determine what specific work was required and were therefore "void for vagueness." Brief for appellant at 44. We do not consider this assignment of error, because the Heffelbowers did not present this issue to the trial court. As previously stated, an appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court. Kubicek v. City of Lincoln, 265 Neb. 521, 658 N.W.2d 291 (2003); Maxwell v. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001).

CONCLUSION

We conclude that each of the Heffelbowers' assignments of error either is without merit or is not susceptible to review because it was not presented to the trial court. We therefore affirm the trial court's order which affirmed the September 26, 2000, order of the Board.

AFFIRMED.

APPENDIX C

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

C. DAVID HEFFELBOWER AND WILMA HEFFELBOWER,	)
	) Case Number
	) CI00-3816
Plaintiffs/Appellants,	)
	)
v.	)
	)
THE CITY OF LINCOLN, a Municipal Corporation,	)
	)
Defendant/Appellee.	)

ORDER

This case involves an appeal taken from an order of the Dangerous Buildings Code Board of the City of Lincoln (the board) issued on September 26, 2000. The plaintiffs are C. David Heffelbower and Wilma Heffelbower, husband and wife, (jointly referred to as the plaintiffs and individually as David or as Wilma). The defendant is the City of Lincoln, a Municipal Corporation (the city).

An appeal of this nature is heard as in equity, without a jury, and the court determines ". . . anew all questions raised before the city. The court may reverse, affirm, wholly or partly, or may modify the order or decision brought up for review." NEB. REV. STAT. Section 15-1205 (Reissue 1997).

Pursuant to the pretrial order entered on July 10, 2001,

(1) the plaintiffs asserted the trial issues where whether the residence located at 1819 Washington Street, in Lincoln, Nebraska, (the residence) was dangerous; whether the plaintiffs were given a reasonable amount of time to comply with the board's order of January 11, 2000; and the applicability of Blanchard v. City of Ralston, 251 Neb. 706, 559 N.W.2d 735 (1997), to the instant case, while

(2) the defendant asserted the trial issues were whether the plaintiffs previously stipulated the residence was dangerous; whether the plaintiffs were given a reasonable amount of time to comply with the board's order of January 11, 2000; and the applicability of Blanchard. (The pretrial order itself refers to the Nebraska Court of Appeals citation for Blanchard, since that is the citation that was provided to the court at that time.)

At trial, the plaintiffs presented evidence and rested. The city's motion to dismiss was argued and taken under advisement. The city presented evidence and rested. The plaintiffs presented rebuttal evidence and rested. The city rested. The matter was argued and taken under advisement.

FACTS

Among other things, the following facts have been stipulated to by the parties:

On March 30, 1999, a fire occurred at the residence. At that time, the plaintiffs were residing at the residence and each had an ownership interest in the residence.

On March 30, 1999, a Notice and Order was sent by the city to Wilma. The Notice and Order of March 30, 1999, advised Wilma that a city building official had declared that dangerous conditions existed at the residence. The Notice and Order of March 30, 1999,

provided that the residence was to be demolished or the dangerous conditions were to be repaired by May 30, 1999.

On October 13, 1999, the plaintiffs filed an appeal of the Notice and Order of March 30 to the board. Although the appeal was filed after the thirty-day deadline of April 30, the city elected to send a second Notice and Order, since David was not included in the Notice and Order of March 30 and it was necessary to insure that both David and Wilma received proper notice.

On November 17, 1999, a second Notice and Order was sent by the city; this time to David and Wilma. The Notice and Order of November 17, 1999, notified the plaintiffs that a city building official had declared that dangerous conditions existed at the residence.

The Notice and Order of November 17, 1999, provided that the residence was to be demolished or the dangerous conditions were to be repaired by January 17, 2000.

On November 24, 1999, the plaintiffs appealed the Notice and Order of November 17, 1999, to the board, requesting that they be given 120 days, or until April 14, 2000, for the completion of the repair work at the residence. On December 9, 1999, a Hearing Notice was sent to the plaintiffs by the city, notifying them that hearing on their appeal of the Notice and Order of November 17, 1999, would be held on December 29, at 3:00 p.m.

On December 29, the board heard the plaintiffs' appeal.

On January 11, 2000, the board issued an order finding that the plaintiffs should be given additional time to complete the repairs necessary to abate the dangerous conditions at the residence. The order stayed and suspended the Notice and Order of November 17, 1999, subject, as described in the parties' stipulation, to the

following time conditions:

A. Within fifteen (15) days from the date of this Order, [the plaintiffs] shall submit to the Department of Building and Safety [(the department)] detailed plans for temporary bracing of [the residence] to prevent its collapse.

Said temporary bracing plans shall bear the signature and the seal of a licensed structural engineer. Fifteen days from the date of this Order is equivalent to January 26,2000. [Temporary bracing plans for [the residence] were filed by Mr. L.W. Hoffman on January 26, 2000.]

B. Within thirty (30) days from the date of this Order, [the plaintiffs] shall submit an application to [the department] for a building permit to abate the dangerous conditions of [the residence] and have the temporary bracing in place. The application for the building permit shall include plans which comply with City Codes bearing the signature and seal of a licensed structural engineer. Also within thirty (30) days from the date of this Order, all extraneous items within [the residence] shall be removed so as not to impede or interfere with the required repairs. Thirty days from the date of this order is equivalent to February 10,2000. [The department recorded that David applied for a building permit on February 9. The building permit did not have plans submitted with an engineer's stamp. Plans sent by David on March 18, 2000, with a structural engineer's stamp attached were received by the city on March 21.]

C. Within one hundred twenty days (120) days [sic] after obtaining a building permit, the dangerous conditions of [the residence] shall be fully abated; and thereafter the repairs and rehabilitation of [the residence] shall proceed steadily until [the residence] meets City codes and is ready to be occupied. [The building permit was applied for on February 9, 2000, and was approved on March 31, 2000.] One hundred twenty days from the date after approval of the building permit

is equivalent to July 29, 2000.

D. If within thirty (30) days from the date of this Order the conditions in A and B have not been met then [the city] may proceed in its demolition of [the residence] without further Order of [the board] in accordance with Section 701 of the Uniform Code for the Abatement of Dangerous Buildings (1994 Edition).

E. If the conditions of A and B have been met, but within 120 days from the date of the issuance of a building permit the conditions in C have not been met, the Building Official shall reschedule this matter upon ten (10) days [sic] written notice to [the plaintiffs] for further hearing as to whether they should be given additional time to complete the conditions in C or whether [the city] may proceed in its demolition of [the residence].

On June 22, 2000, the plaintiffs applied to the department for a Mechanical/Gas Piping permit, a Plumbing/Gas Piping/Excavation permit and an Electrical permit for the residence. (The parties agreed that this stipulated fact did not preclude the plaintiffs from providing evidence that the plaintiffs applied for an Electrical permit prior to June 22.)

The Mechanical/Gas Piping and, the city's records show, the Electrical permit were both issued on June 22, 2000. The Plumbing/Gas Piping/Excavation permit was issued on July 12. On July 28, 2000, the department approved the electrical installment and submitted a daily order sheet to Lincoln Electric System (LES) to energize the installment.

On August 10, 2000, LES completed a Service Work Ticket for David for the residence, showing that electrical service started at the residence on August 10, with a temporary plugged meter. Therefore, it took LES eight working days from July 28 to install electrical service at the residence. On August 21, LES issued a

Work/Investigate Ticket for the residence, showing that the temporary plugged meter was removed and that a permanent meter installed on that date.

On August 16, 2000, a Notice was sent to the plaintiffs informing them of a hearing to be held on September 14, 2000, before the board concerning the Notice and Order of November 17, 1999. A hearing was held on September 14.

On September 26, the board issued its order. The order found that the plaintiffs had failed to comply with the board's order of January 11, 2000; that, notwithstanding the plaintiffs having been granted additional time to stabilize the residence, the residence remained a dangerous building in need of repair or demolition; and that the granting of additional time to abate or repair the residence was not warranted under the circumstances.

The board sustained the plaintiffs' November 24, 1999, appeal of the Notice and Order of November 17, 1999, ". . . but only to the extent of the time previously allowed and the additional time is hereby allowed through September 14, 2000 ...." In all other respects, the boar d affirmed the Notice and Order of November 17, 1999. The board directed the director of the department to repair or demolish the residence. (The plaintiffs' have stipulated that the order of September 26 found the residence to be a dangerous building and that additional time to abate or repair the residence was not warranted under the circumstances; however, the plaintiffs have not stipulated those findings to be true.)

Without limitation, the court finds the additional facts existed up to the issuance of the board's order of September 26, 2000:

The Notice and Order of November 17, 1999, found the following conditions or defects to exist:

(1) The structural strength and stability of the residence was materially less than it was before the fire on March 30, 1999, and was less than the minimum required by the city's building code for a new building of similar structure, purpose or location;

(2) due to the fire, portions of the residence were likely to become detached, dislodged or to collapse and injure persons and/or damage property;

(3) due to the fire, the residence was manifestly unsafe for the purpose for which it was intended;

(4) due to the fire, the residence was not occupiable and its condition could result in an attractive nuisance to children or in it becoming a haven for vagrants, criminals or immoral persons;

(5) the condition of the residence made it a fire hazard; and

(6) the residence was a public nuisance.

The plaintiffs were given to January 17, 2000, to abate the dangerous conditions or defects. (A reference to "1999" in the Notice and Order is clearly a scrivener's error.) The plaintiffs were also advised that they had a right to appeal the findings set forth in the Notice and Order of November 17, 1999.

On November 24, 1999, the plaintiffs filed an appeal from the Notice and Order of November 17. Section 102 of the Uniform Building Code (1997) provides, in part, that ". . . unsafe buildings . . . shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedures set forth in the Dangerous Buildings Code . . ." The Uniform Code for the Abatement of Dangerous Buildings (1994 Edition) (the dangerous buildings code) is the applicable Dangerous Buildings Code. Section 503 of the dangerous buildings code provides that "[o]nly those matters or issues specifically raised by the appellant

shall be considered in the hearing of the appeal." In their appeal, the plaintiffs only contested the amount of time they were being given to abate the dangerous conditions or defects. They did not raise as an issue the determination that the residence was, in fact, a dangerous building.

When they appeared before the board on December 29, 1999, the plaintiffs agreed that the residence was, at that time, a dangerous building, as defined by Section 302 of the dangerous buildings code. (During the hearing, David, in addressing the city's determination that the residence was a dangerous building, stated: "We are not contesting that.") The only issue presented to the board, therefore, was the reasonableness of the requirement of the Notice and Order of November 17, 1999, that repairs to abate the dangerous conditions or defects be completed by January 17, 2000. As noted previously, the plaintiffs were requesting that they be given to April 14, 2000, to complete the necessary repairs.

Following the hearing of December 29, 1999, the board issued its order of January 11,2000. The order, in part, granted the plaintiffs' request for additional time and, among various progression requirements, provided that, "[w]ithin one hundred twenty days (120) days after obtaining a building permit, the dangerous conditions of [the residence] shall be fully abated; and thereafter the repairs and rehabilitation of [the residence] shall proceed steadily until [the residence] meets City codes and is ready to be occupied." The January 11 order also "stayed and suspended" the Notice and Order of November 17, 1999, which required that the residence be demolished or repaired by January 17, 2000.

In the Notice of August 16, 2000, the plaintiffs were advised that a hearing was set for September 14 to address the issue of the repair, vacation or demolition of the residence. Although the Notice does not specifically refer to the Notice and Hearing of November 17, 1999, and/or to the plaintiffs' appeal filed on November 24, at

the commencement of the hearing, which the plaintiffs attended and participated in with their counsel, reference to the conditions of the board's order of January 11, 2000, was made. It is evident, therefore, that the hearing of September 14, 2000, was a continuation of the hearing of December 29, 1999, which addressed the issues set forth in the Notice and Order of November 17, 1999.

Following the hearing of September 14, the board issued its order of September 26.

Among other things, as noted previously, the board found the residence ". . . remains a dangerous building in need of repair or demolition" and directed the director of the department to either repair or demolish the residence. The order noted "[t]his is a final order of the Board."

This appeal followed.

DISCUSSION

A. Motion to Dismiss Appeal:

The city's motion made at the close of the plaintiffs' case to dismiss their appeal should be, and hereby is, denied.

B. Is the residence "dangerous," as defined by the dangerous building code?

The court first addresses whether the issue of whether the residence is a dangerous building is properly before it, since, as the city has noted, the plaintiffs previously stipulated the residence was a dangerous building and did not raise the issue in their appeal filed November 24, 1999.

Although the issue of whether the residence was a dangerous building was not raised by the plaintiffs' appeal, the issue of whether the residence remained a

dangerous building as of September 14, 2000, was addressed by the board in its order of September 26, 2000.

That may very well have been due to the passage of a considerable amount of time after the issuance of the Notice and Order of November 17, 1999. Since the issue of whether the residence remained a dangerous building was addressed by the board, the court considers the issue was raised before the board and is, therefore, properly before the court.

Section 302 of the dangerous buildings code sets forth a list of conditions or defects, the existence of any one or more which results in a building or structure being ". . . deemed to be a dangerous building, provided that such conditions or defects exist to the extent that the life, health, property or safety of the public or its occupants are endangered." As noted previously, the Notice and Order of November 17, 1999, found the following defects to exist at the residence:

1. Its structural strength and stability was materially less than it was before the fire on March 30,1999, and was less than the minimum required by the city's building code for a new building of similar structure, purpose or location. This is a defined condition or defect under Section 302(4) of the dangerous buildings code.

2. Portions of it were likely to become detached, dislodged or to collapse and injure persons and/or damage property. This is a defined condition or defect under Section 302(5) of the dangerous buildings code.

3. It was manifestly unsafe for the purpose for which it was intended. This is a defined condition or defect under Section 302(9) of the dangerous buildings code.

4 It was not occupiable and its condition could result in an attractive nuisance to children or in it becoming a haven for vagrants, criminals or immoral persons. This is

a defined condition or defect under Section 302(12) of the dangerous buildings code.

5. Its condition made it a fire hazard. This is a defined condition or defect under Section 302(16) of the dangerous buildings code.

6. It was a public nuisance. This is a defined condition or defect under Section 302(17) of the dangerous buildings code.

Section 202 of the dangerous buildings code provides that "[a]ll buildings or portions thereof which are determined after inspection by the building of fiscal to be dangerous as defined in this code are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedure specified in Section 401 of this code."

The question is not whether anyone has been injured working in the residence since the fire of March 1999, whether the residence has been "secured" or whether the residence is no more dangerous than a construction site. The issue is whether the residence remains dangerous under the dangerous buildings code. The court finds that it does.

The work that has been done on the building has been done in a haphazard and sporadic manner and, in some instances, improperly. The city's contract structural engineer described most of the repairs to or work done on the residence as of October 12, 2001, as being "meaningless." Some level of work has been done on each floor, without starting at the foundation and working up, the consensus manner in which abatement should have occurred.

At a minimum, as of October 12, 2001, the structural strength and stability of the residence was materially less than it was before the fire of March 1999 and less than the minimum required for new buildings of similar

structure, purpose or location; portions of the residence continued to remain likely to become detached, dislodged or to collapse and potentially injure persons or damage property; the residence remained manifestly unsafe for the purpose for which it was intended (i.e., human occupation); and the residence remained a fire hazard.

The court finds the residence remains a dangerous building, as defined by the dangerous buildings code.

C. Whether the plaintiffs were given a reasonable amount of time to comply with the conditions of the board's order of January 11, 2000?

In their appeal filed November 24, 1999, the plaintiff requested an extension of time from January 17, 2000, to April 14, 2000, to complete the repairs necessary to abate the dangerous nature of the residence. The board, with its order of January 11, 2000, agreed with that request. Notwithstanding having until, at least, September 14, 2000, the date of the hearing before the board (and arguably until October 12, 2001, the last day an inspection of the residence was made by a representative of the city prior to the trial of this matter), the plaintiffs have failed to abate the dangerous conditions or defects.

In addition to their argument that the dangerousness of the residence has been abated, an assertion with which the court does not agree, the plaintiffs argue that the city and/or LES have some how acted to impede their ability to abate the dangerous conditions or defects. The evidence does not support that argument. In fact, all indications are that the city has cooperated fully with the plaintiffs in trying to afford them an ample amount of time to abate the dangerous conditions or defects. For whatever reasons, fiscal or otherwise, the plaintiffs have elected to personally address the majority of the work needed to abate the dangerous conditions or defects and have failed, within the more than reasonable amount of time afforded to them by the city, to accomplish that task.

This assertion is without merit.

D. The applicability, if at all, of Blanchard v. City of Ralston, 251 Neb. 706, 559 N.W.2d 735(1997), to this case?

Under the facts and circumstances of this case, the court finds Blanchard is not applicable. The city provided the plaintiffs with ample due process. The plaintiffs were advised of the specific conditions or defects which resulted in the residence being found to be a dangerous building and were given more than a reasonable amount of time to abate the dangerous conditions or defects.

Conclusion

The September 26, 2000, decision of the board is affirmed. The costs of this action are taxed to the plaintiffs. Any request for relief by either party not specifically granted by this order is denied.

A copy of this order is sent to counsel of record.

Dated February 7, 2002.

SO ORDERED.

BY THE COURT

s/Paul D. Merritt, Jr.
District Judge